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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1671

KANSAS CITY, A MISSOURI MUNICIPALITY,
Petitioner,

vs.

CLAUDE G. WEBB, ET AL.,
Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC

OPINIONS BELOW

Appendix A of the Petition for a Writ of Certiorari to the Supreme Court of Missouri, En Banc, is the unreported but unanimous opinion of both Division No. 1 of the Missouri Supreme Court (June 14, 1971) and of the Missouri Supreme Court, En Banc (March 13, 1972).

JURISDICTION

The Petition for a Writ of Certiorari to the Supreme Court of Missouri, En Banc, was not filed within the ninety (90) days granted by the Missouri Supreme Court, En Banc, in its Order of March 23, 1972 (see petitioner's Appendix D).

CONSTITUTIONAL PROVISIONS, STATUTES, AND CHARTER PROVISIONS INVOLVED

The petitioner has omitted the following Kansas City Charter Provisions from its Petition, although they are cited and set forth in the identical Opinions of both Division No. 1 of the Missouri Supreme Court and the Missouri Supreme Court, En Banc, and they are as follows:

"Upon the day fixed by the order and notice for the empaneling of a jury, or upon any day thereafter to which the proceedings in said cause have been continued or adjourned, the court shall empanel a jury of six (6) disinterested freeholders of the city, who shall receive the same compensation as other jurors in such court. The term 'disinterested freeholder' as used herein, shall not be so construed as to disqualify any person for service as such juror because of the fact that he is a trustee in a deed of trust upon property taken or damaged or within the benefit district in said proceedings." *Article VI, Section 142, Constitutional Charter of Kansas City, Missouri*

"At the hearing of said cause the parties interested may submit evidence to said jury of freeholders touching the matters under consideration. Such jury may examine personally each piece of property described on the map or plat filed in said cause as aforesaid, and all property claimed to be damaged, and the property, if any, to be assessed with benefits; and the city engineer, the director of public works, or the superintendent of parks, or any assistant of any of them, may accompany such jury for the purpose of pointing out the property aforesaid." *Article VI, Section 144, Constitutional Charter of Kansas City, Missouri*

"If any incorporated company which may be interested in the whole or in any part of the land to be taken or

damaged by the said proceedings, be entitled, under the law of the land, to trial of its claims for compensation therefor by a common law jury of twelve men, it may at any time prior to the day fixed as herein provided for empaneling a jury, file in the office of the clerk of said court, a petition in which it shall state the description of the property owned or claimed by it so to be taken or damaged and the amount and nature of its claim therefor and may further state that it demands a trial before a common law jury of twelve men of its claim for compensation therefor. If any such incorporated company shall not so file such petition before such date, it shall be deemed and taken to have waived its right of trial by a jury as aforesaid of such issue. If any such incorporated company shall file such petition as aforesaid, then the court thereupon shall cause such jury to be empaneled for the trial of such claim; and the issues to be tried by such jury shall be the actual value of the land of such claimant taken, if any; and the amount of damage to the land of such claimant not taken, by the public use thereof, and by the use of the land taken for the purposes for which it is taken including all that the city may, from time to time, do or cause to be done with or upon the private property so taken or damaged. If two or more such incorporated companies interested in the land to be taken or damaged as aforesaid be entitled to trial by a common law jury as aforesaid, and shall make demand therefor as aforesaid, the court may, in its discretion, as may appear expedient, order that all such claims shall be tried at the same time before one jury, and further proceedings in the original cause shall be continued from time to time by the court until such issue or issues as to such incorporated companies shall have been determined by the verdict of such jury.

"Any party to such issue which may feel aggrieved by the verdict of said jury may, within four days after the rendition of the same, file its motion for a new trial and in arrest of judgment, and said motion or motions shall be heard without delay, and after hearing the same, the court may overrule the same, or may order a new trial of such issue or issues on good cause shown; but no appeal from the judgment of the court overruling such motion shall be had therein until the final judgment of confirmation of the entire proceedings by the said court as hereinafter provided." *Article VI, Section 147, Constitutional Charter of Kansas City, Missouri*

"The jury of freeholders shall ascertain the just compensation to be paid, as follows:

"First. For each piece of property taken, when the public use thereof shall be such that the city must have exclusive possession and control thereof, the actual value of the property taken.

"Second. For each piece of private property taken, when the public use thereof may be such that the city need only have such possession and control as shall not wholly exclude the beneficial use thereof by the owner or owners, the actual damage from the public use specified in the ordinance.

"Third. For all damages to each piece of private property not actually taken so as to give the city the possession or control of same, the actual amount of damages such private property may sustain from the use of the private property taken for the public use for which it may be taken, including all that the city may from time to time do or cause to be done in, with or upon the property so taken.

"Provided: That in case of any claim for compensation for private property taken or damaged in such proceedings shall have been tried, determined and ascertained by a common law jury as hereinbefore provided, and jury of freeholders in said proceeding shall accept and adopt the valuation or assessment of damages for any such private property so assessed by such common law jury, and shall so recite the same in and as part of any verdict thereafter rendered in said proceedings by such jury of freeholders.

"And provided, further: That upon request of any interested party, entered of record in such proceedings, the jury shall assess separately the damage to the lessor and to the lessee of any property so taken or damaged, upon which there is shown to be an existing lease, introduced in evidence in such proceedings." *Article VI, Section 149, Constitutional Charter of Kansas City, Missouri*

"The Court, on its own motion, or on the motion of the city or of any party interested in the proceedings filed within four days after the rendition of any verdict by a jury of freeholders, as above provided for, may for good cause set aside such verdict and thereupon, without further notice, may appoint a new jury of freeholders to try the cause de novo and to render a new verdict therein; and in the order setting aside such verdict, the court shall fix a time and place for empaneling such new jury and for a rehearing of the whole matter; provided, that the verdict of any common law jury therefore rendered in said proceeding, fixing the compensation to be paid to any incorporated company, shall be accepted and adopted by such new jury as part of its finding and verdict." *Article VI, Section 155, Constitutional Charter of Kansas City, Missouri*

QUESTIONS PRESENTED

1. Where it is afforded to corporate landowners, does the denial to individual landowners of their timely request for a trial on the issue of damages before a common law jury deny them equal protection of the laws and equal rights and opportunity under the law in violation of the federal and state constitutional provisions invoked?

2. Does the application of Amendment XIV to the Constitution of the United States and of the equal rights and opportunity clause of Article I, Section 2 of the Constitution of Missouri, 1945, by the Supreme Court of Missouri, En Banc, to a Missouri Charter City condemnation proceeding so as to require like treatment of individual and incorporated company landowners similarly situated create a new right in the individual landowners?

STATEMENT OF THE CASE

An action in condemnation was filed by the petitioner on September 3, 1968 and the trial court set November 1, 1968 as the date for empaneling a charter jury. On October 31, 1968 individual landowner, Bertha Bell, filed (Appendix A) a petition (as provided in the Kansas City Charter, Article VI, Section 147, for incorporated companies) therein demanding a trial before a common law jury of twelve upon her claim for compensation. On November 1, 1968 the court overruled her petition, whereupon she filed (Appendix B) an answer alleging the procedure denied her equal protection of the laws, equal rights and opportunity under the law, and due process of law under specific provisions of the federal and state constitutions. The charter condemnation process was completed and her motion (Appendix C) for a new trial was overruled and condemnee Bertha Bell and condemnees Claude G. Webb,

Coga Webb, Kenneth Brightwell and Martha Brightwell appealed. The Supreme Court of Missouri, twice, sustained their appeal and ordered a new trial upon the issue of damages before a common law jury of twelve persons or a newly empaneled freeholder's jury, at the individual landowner's election (Petitioner's Appendix A).

REASONS FOR DENYING THE WRIT

1. The opinion complained of does not create a new right nor work a deprivation of any rights of either the petitioner or its electorate.

In its well-reasoned and carefully annotated opinion, the Missouri Supreme Court reached a decision which is neither novel nor strained. Given the facts, it did not need to construe, but merely to apply the constitutional rights created by the provisions invoked. It reached the inevitable conclusion that there is no rational basis for affording a common law jury trial on damages to an incorporated company landowner and denying it to an individual landowner similarly situated as a condemnee in a municipal eminent domain proceeding.

The petitioner seems to contend (p. 12) that its Charter provisions and certain (unstated) procedural provisions of the Missouri Constitution should take precedence over the fundamental rights established by the equal protection clause of Amendment XIV to the Constitution of the United States and the equal rights and opportunity clause of Article I, Section 2, of the Constitution of Missouri. It suggests that the court has (1) deprived the petitioner's legislative body of its legislative discretion to select the mode of procedure and (2) that the court had legislated rather than exercised a judicial function.

In support of (1), the petitioner cites *Port of New York Authority* v. *Heming*, N.J. Sup., 1961, 167 A.2d 609, certiorari denied and appeal dismissed, 81 S.Ct. 1676, 367 U.S. 487, 6 L.Ed.2d 1241. A careful reading of the majority opinion at page 616 discloses that the right in a condemning authority to choose between two condemnation techniques does not deny equal protection of law to condemnees, but that each technique must provide for even-handed treatment (equal protection of law) within its framework. The petitioner here has not been deprived of its privilege to select one of two techniques of condemnation, but rather the Missouri Supreme Court has merely required that when the petitioner chooses to use the condemnation technique provided by its Charter, the court wherein the proceeding lies must afford even-handed treatment (equal protection of law) for all similarly situated condemnees. As to (2), respondents had thought the issue of whether an appellate court can determine the constitutionality of legislative enactments had long since been settled, *Marbury* v. *Madison*, 1 Cranch. 137, 2 L.Ed. 60, et seq.

It is difficult to share the petitioner's vision of chaos (pages 13 and 14 of its Petition) as a result of permitting twelve (12) person jury trials when timely requested by individual condemnees in Kansas City, Missouri. Nothing in the court's opinion, which is silent upon the subject, prevents (or requires) joinder. The question was not raised below, and does seem rather strained here.

Petitioner's assertion of a judicially legislated "new right" somewhat unfairly ignores the participation by the electorate of Missouri in adopting Article I, Section 2 of its Constitution and by the electorate of the several States in adopting Amendment XIV to the Constitution of the

United States. It also ignores the careful scholarship of the court in its opinion tracing the history of the development of relevant law in Missouri, beginning with the 3rd paragraph on page A8 of petitioner's Appendix A, and suggests that petitioner may not be familiar with the line of cases set out therein.

2. The facts of this case, set forth above and stated in the opinion complained of, clearly require the application of the constitutional provisions invoked.

It is true that no incorporated company was involved in this case, however the petitioner has conceded that under Section 147 of Article VI of its Charter, a corporation has a right to elect to have its damages assessed by a common law jury (see petitioner's Appendix A, page A7). Suppose Bertha Bell had owned only one-half of the tract involved and the XYZ Company, Inc., owned the other half. And both had filed their timely written demands for a trial before a common law jury of twelve (12) persons for their claims for compensation as provided in petitioner's Charter, Article VI, Section 147 (pages 2 and 3 hereof). Petitioner concedes that the XYZ Company, Inc., has such a right and would be entitled to have its damages so assessed, but argues that Bertha Bell and others do not. But no reasonable argument or factual basis is advanced in support of the position. One wonders what petitioner's position on a co-tenancy or a joint tenancy would be in such a situation.

The petitioner contends that because corporations are artificial persons, cannot vote and that railroad corporations may once (deservedly?) have been the victims of prejudice, certain special laws were enacted ". . . to insulate them from the possible prejudices. . . ." Assuming this to be true, it is hard to see how it helps the petitioner's posi-

tion, and, in fact, quite the reverse. It indirectly but clearly concedes unequal protection of the laws and of unequal rights and opportunity under the law. Further, the case of *Kansas City* v. *Smart*, Mo. Sup., 1895, 30 S.W. 773, which petitioner relies upon, did not consider the admittedly preferential treatment of a corporate condemnee in light of the issue of equal protection of the laws.

Contrary to petitioner's assertion, the Missouri Supreme Court, En Banc, did not suggest or imply any special "magic" to a jury trial by twelve persons. It merely held that what was fair for one land owning condemnee was fair for all similarly situated condemnees, and that all such must be treated alike in like circumstances. It was unable to find any rational basis for distinguishing between incorporated companies and individuals so situated.

And, rather, it appears that the petitioner is urging some special "magic" of its own to its six man charter jury. Perhaps because they are so well-paid and generally composed of repeaters (whom an experienced city counselor would know to be "safe"). Section 142 of petitioner's Charter provides that charter jurors "Shall receive the same compensation as other jurors in such court". The Supreme Court of Missouri, at page A3 of petitioner's Appendix A, points out that the jurors in this case were paid $150.00 per day each.

The petitioner seems to feel that the Missouri Supreme Court did not take into consideration its own previously decided cases regarding the petitioner's use of its charter condemnation technique, and in support thereof, cites the case of *Kansas City* v. *Bacon*, Mo. Sup. Banc, 57 S.W. 1045, l.c. 1051. The Supreme Court of Missouri, En Banc, is perhaps a better judge of its own decisions than is the petitioner. Certainly, the individual landowners affected herein are better judges of their alleged "benefits" than is

the petitioner. All the individual landowners want, have demanded and still seek, is a fair trial.

Petitioner further relies upon *Dohany* v. *Rogers, Commissioner*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904, l.c. 912; *Mallette* v. *United States*, CCA 8th 1943, 137 F.2d 95, l.c. 96; and *Uhlmann* v. *Wren*, Ariz. Sup. 1965, 97 Ariz. 366, 401 P.2d 1133, l.c. 127-129. *Dohany* v. *Rogers, Commissioner*, is of no help, for in the case the court did not consider the deprivation of equal protection of law in light of whether or not a specific condemnation technique provided in its framework for even-handed treatment of all similarly situated condemnees. It held merely that a state legislature might classify condemning authorities differently for the purpose of granting to one a condemnation technique which was not available to another. The case of *Mallette* v. *United States*, supra, did not directly consider whether the denial to an individual land owning condemnee in a proceeding for condemnation brought by a constitutional charter city would deny such individual landowner equal protection of the law, and merely reiterated the constitutional right of an incorporated company to a common law jury trial by way of dicta. Lastly, the case of *Uhlmann* v. *Wren*, supra, is of no more help to petitioner than the previously discussed *Dohany* v. *Rogers, Commissioner*, in that it also considered only whether a state might classify condemning authorities differently so as to afford different condemnation techniques to them. The question of whether or not a land owning condemnee was or was not afforded equal protection of the law within a specific condemnation technique was neither raised nor considered.

If the number of jurors, in and of itself, was to any extent relevant, respondents could understand the petitioner's citation of *Williams* v. *Florida*, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446. It appears that the petitioner has

a "fixation" with this issue. The difference between a twelve man common law jury and a six man charter jury lies not merely upon the difference in number of jurors who sit in these two juries, but also with the manner of their selection, rate of compensation, and other factors considered by these condemnees to be material to the protection of their interests. Interestingly enough, however, the petitioner does not mention whether the individual convicted of robbery in *Williams* v. *Florida*, supra, was compelled to accept a jury of six individuals when some other person charged with the commission of the same crime in the State of Florida would have been afforded a jury made up of a different number of jurors.

3. Division No. 1 of the Missouri Supreme Court and the Missouri Supreme Court, En Banc, have reached identical unanimous decisions construing the same constitutional provisions of the United States Constitution and the Constitution of Missouri.

The identical unanimous decisions reached, first by Division No. 1 of the Missouri Supreme Court and thereafter by the Missouri Supreme Court, En Banc, amply demonstrate both the depth and consistency of the results of judicial reviews of the issue of whether the respondents were denied the equal protection of the law and equal rights and opportunity under the law, and should therefore be conclusive upon this Honorable Court. *Montana* v. *Rice*, Mont. 1907, 27 S.Ct. 281, 204 U.S. 291, 51 L.Ed. 490.

In addition, the decisions may readily be supported upon the violation of the equal rights and opportunity clause of Article I, Section 2, of the Constitution of Missouri, 1945, and as a consequence thereof, should not be disturbed. *Hammerstein* v. *Superior Court of Cal., in and for Los Angeles County*, Cal. 1951, 71 S.Ct. 521, 340 U.S. 622, 95 L.Ed. 586.

CONCLUSION

The respondents respectfully submit that the Missouri Supreme Court, En Banc, has reached the only decision possible, based upon the facts presented and after taking into due consideration all cases having any relevancy to the issue presented. And that its opinion reflects only the application of the equal protection clause of Amendment XIV to the Constitution of the United States and the equal rights and opportunity clause of Article I, Section 2 of the Constitution of Missouri, 1945, to a readily apparent violation of each.

WHEREFORE, respondents pray that this Honorable Court deny the Petition for a Writ of Certiorari to the Supreme Court of Missouri, En Banc.

Respectfully submitted,

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1-816-842-0480
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Attorney for Respondents, Claude G. Webb, Coga Webb, Kenneth D. Brightwell and Martha Brightwell

APPENDIX A

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

CONDEMNING PRIVATE PROPERTY FOR PUBLIC USE FOR SEWER AND WATER RIGHTS OF WAY IN KANSAS CITY, JACKSON COUNTY, MISSOURI; PROVIDING FOR JUST COMPENSATION THEREFOR; UNDER ORDINANCE OF KANSAS CITY, MISSOURI, NO. 45677, PASSED AUGUST 9, 1968.	No. 718612 Div. No. 3

PETITION

Comes now Bertha Bell, by and through her attorney, W. K. Poindexter, condemnee herein, and states:

1. That she has an interest in Tract No. 25, a part of the land herein sought to be taken or damaged by these proceedings.

2. That she is entitled, under the law of the land, to trial of her claims for compensation therefor by a common law jury of twelve men.

3. That the day fixed for empaneling a jury of six is November 1, 1968.

4. That the property owned or claimed by her is described as follows:

TRACT 25

All that part of the Northeast ¼ of Section 11, Township 48, Range 32, in Kansas City, Jackson

County, Missouri, lying within 7.5 feet of the following described line:

Beginning at a point on the South line of said ¼ Section, and 3.82 feet East of the East line of Noland Road; thence North 0-47′-00″ East this and subsequent bearings referring to the West line of the Northwest ¼ of said Section 11 as having a bearing of North 0-45′-37″ West, a distance of 802.58 feet; thence North 8 -28′ -00″ East, a distance of 408.75 feet; thence North 13 -33′ -00″ East, a distance of 744.65 feet; thence North 11-02′-00″ East, a distance of 191.23 feet; thence North 2 -22′-00″ East, a distance of 171.80 feet; thence North 2 -39′-00″ West, a distance of 141.31 feet; thence North 3 -32′-00″ West, a distance of 70.71 feet, to a point on the North line of said ¼ Section and 16.38 feet East of the Easterly line of Noland Road, Except that part thereof in Noland Road, together with all that portion of the East half (E ½) of Section 11, T. 48 R 31 lying East of the centerline of Noland Road as presently established and North of the centerline of Little Blue Road as presently established, excepting therefrom Tract 24 in the Southwest corner thereof, all as described in City's ordinance and exhibits which are hereby incorporated by reference as though fully set out herein.

5. That the amount of her claim is for $9,934.08 plus the value of excess severed land, plus her costs and expenses herein incurred, and the nature thereof is that the City proposes to invade the privacy of her land in perpituity; that in doing so it will damage same and reduce the value thereof and that there will be damages; that the City has not offered and does not propose to pay the actual value of the right-of-way taken or of the damages to the remainder; that such right-of-way could and would interfer

with the highest and best use of said land; that said use would pre-empt the choice location and logical site for sewers, water and utility lines to properly and economically serve the remainder; that the proposed use as a force main is potentially hazardous to health and safety; that the proposed line is for private rather than public use; that there is a sewage treatment site closer and more convenient for the City's use without crossing her land; that the force main does not benefit the condemnee or her property; that she has not consented to the granting of the right-of-way sought or the proposed use thereof; that present or future improvements placed thereon will be damaged or destroyed by the City; that the proposed taking includes her entire frontage along Noland Road; that at some points it extends unreasonably into her property; that the City's offer of $1,300.00 is arbitrary and capricious, and was not made in good faith; and that the reasonable value of such taking would be as set forth hereinabove.

WHEREFORE, she demands a trial before a common law jury of twelve men of her claim aforesaid.

/s/ William K. Poindexter
William K. Poindexter
Attorney for Condemnee
801 Broadway
Kansas City, Missouri 64105
VI 2-0480

Tha foregoing petition was filed on October 31, 1968, in the office of the Clerk of the Court, Sixteenth Judicial Circuit, and a copy thereof to the Office of City Counselor of Kansas City, Mo. on said date.

/s/ William K. Poindexter

APPENDIX B

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

CONDEMNING PRIVATE PROPERTY FOR PUBLIC USE FOR SEWER AND WATER RIGHTS OF WAY IN KANSAS CITY, JACKSON COUNTY, MISSOURI, PROVIDING FOR JUST COMPENSATION THEREFOR; UNDER ORDINANCE OF KANSAS CITY, MISSOURI, NO. 35677, PASSED AUGUST 9, 1968.	NO. 718612 DIV. NO. 3

ANSWER

Comes now Bertha Bell, condemnee of Tract No. 25 herein, and for her answer states:

1. That she denies that the proposed use for a force main of the right-of-way sought herein is a public use within the meaning of Article I, Sec. 28 of the Constitution of 1945 of Missouri, and that, on the contrary, the proposed use is a private use of benefit to private developers landowners, property and persons unknown to her.

2. That she has not consented to said use and is entitled to the protection of said Article I, Sec. 28.

3. That the description contained in the City's Ordianance and notice does not include all of the real property of the condemnee which would be damaged by the proposed taking, including, but not limited to, her remaining property in the East half (E ½) of Section 11, Township 48, Range 33, in Jackson County, Missouri.

4. That the provisions for condemnation set-forth in the Charter of Kansas City, Missouri, deny to her equal protection of the law as provided in the Constitution of the United States, Amendment XIV and Article I, Sec. 2, Constitution of Missouri, in that it purports to authorize condemnation by the City with compensation to be ascertained and assessed by a jury of six freeholders of the city, Charter Secs. 128, 142, 143 and 144 at the election of said City, (or, under Sec. 204 hereof, and at said City's sole discretion, the City may adopt the condemnation procedures of the general laws of the state, Chapter 523) but provides, in Sec. 147, that if any incorporated companies, subject to the same Charter condemnation proceedings, be entitled under law of the land to trial of its claims for compensation by the common law jury of twelve men, it may demand and have such trial and no such protection is afforded to the condemnee herein.

5. That the proposed condemnation further violates condemnee's Federal Constitutional rights under Amendment V with regard to the taking of her property and to the determination of just compensation, under Amendment VII with regard to her right of trial by jury and according to the rules of the common law and under Amendment XIV with regard to depriving her of property without due process of law and denial to her of equal protection of the laws.

6. That the amount of her claim is for $9,934.08 plus the value of excess severed land, plus her costs and expenses herein incurred, and the nature thereof is that the City proposes to invade the privacy of her land in perpituity; that in doing so it will damage same and reduce the value thereof and that there will be damages; that the City has not offered and does not propose to pay the actual value of the right-of-way taken or of the damages to the remainder;

that such right-of-way could and would interfer with the highest and best use of said land; that said use would preempt the choice location and logical site for sewers, water and utility lines to properly and economically serve the remainder; that the proposed use as a force main is potentially hazardous to health and safety; that the proposed line is for private rather than public use; that there is a sewage site closer and more convenient for the City's use without crossing her land; that the force main doesnot benefit the condemnee or her property; that she has not consented to the granting of the right-of-way sought or the proposed use thereof; that present or future improvements placed thereon will be damaged or destroyed by the City; that the proposed taking includes her entire frontage along Noland Road; that at some points it extends unreasonably into her property; that the City's offer of $1,300.00 is arbitarary and capricious, and was not made in good faith; and that the reasonable value of such taking would be as set forth hereinabove.

WHEREFORE, condemnee prays that this action be dismissed with regard to her property with her costs and expenses taxed to the City, and, if not so dismissed, that upon proper and lawful trial and hearing, she be awarded the sum of $9,934.08 plus the value of excess severed land plus her costs and expenses herein incurred, and for such other and further relief as the court may deem just in the premises.

/s/ W. K. Poindexter
William K. Poindexter
Attorney for Condmnee
801 Broadway
Kansas City, Missouri 64105
VI 2-0480

APPENDIX C

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

CONDEMNING PRIVATE PROPERTY FOR PUBLIC USE FOR SEWER AND WATER RIGHTS OF WAY IN KANSAS CITY, JACKSON COUNTY, MISSOURI, PROVIDING FOR JUST COMPENSATION THEREFOR, UNDER ORDINANCE OF KANSAS CITY, MISSOURI, NO. 35677, PASSED AUGUST 9, 1968.	No. 718,612 Div. 3

MOTION TO AMEND JUDGMENT TO DISMISS AND FOR A NEW TRIAL

Comes now CLAUDE G. and COGA M. WEBB, KENNETH D. and MARTHA V. BRIGHTWELL and BERTHA BELL, condemnees herein, and state and show to the court that it has erred as follows:

1. On November 1, 1968, by denying condemnees demand for the same twelve man common law jury trial afforded to corporate condemnees in like circumstances, said demand having been made by petition on October 31, 1968, under and in compliance with Section 147 of condemnor city's charter; the court and/or the said Charter of Kansas City thereby denying to condemnees their right to equal protection of the laws as provided in Amendment XIV of the United States Constitution and to equal rights and opportunity under the law as provided in Section 2 of Article I of the Missouri Constitution.

2. That the court erred in not instructing the jury that said proposed use for a force main of the right-of-way sought

herein was not a public use, when the court knew and the condemnor knew that said proposed use for a force main in the right-of-way sought herein was not a public use, but was a private use and would be of benefit to private developers and private owners of property and persons other than condemnees herein.

3. That the court erred in not instructing the jury that said proposed use was not a public use but was a private use under condemnors Instruction No. 1, and in failing to instruct said jury that the condemnees had not consented to said use and were entitled to the protection of Sec. 28, Article I, of the Constitution of Missouri, 1945, and in refusing and denying condemnees herein the right to said protection.

4. That the court erred in failing to instruct the jury under Instruction No. 1 offered by the condemnors and given by the court, in that the court, prior to said instruction, failed to make a determination whether or not the contemplated use was public, and made no judicial determination in regard to said use before submission to said jury, contrary to Article I, Sec. 28, but rather instructed that the use was a public use, without making any finding therein, and contrary to all the facts and evidence in the record before the court.

5. That the court erred in instructing the jury in giving Instruction No. 1, in that the court failed to instruct the jury that all of the lands in Tract 21 and 25 owned by condemnees herein would be damaged by said construction proposed by said City, but limited said instruction to the permanent easement and the temporary easement only and failed to instruct the jury under said Instruction No. 1 that because of said condemnation said lands would be limited in their use, even to access and exist into and out of said

lands, and that said condemnation deprived the condemnees herein of the existing use and the potential development of said land, so that the full use of said land could be utilized by condemnees, contrary to the facts and the evidence, and contrary to the provisions of Article 28, Sec. 1 of the Constitution of Missouri, 1945.

6. The court erred in allowing and permitting the jury to consider the amount of damage condemnees should be entitled to, and denied to them equal protection of the law as provided in the Constitution of the United States, Amendment 14, and Article I, Section 2 of the Constitution of Missouri, in that the court allowed and permitted the compensation to be ascertained and assessed by a jury of six freeholders of the City of Kansas City, pursuant to Sections of said City Charter, 128, 142, 143 and 144, at the election of said City, or under Section 204 hereof, and at the City's sole discretion the City could adopt the condemnation procedures of the General Laws of the State, which Charter Section set out herein deprived the condemnees of their constitutional rights as set forth herein, because it deprives them of the right to trial by jury, by a common law jury of 12 men.

7. That the court erred in submitting said condemnation to a jury of six freeholders, as set forth under the proceeding paragraph, and violated condemnees' federal constitutional rights under Amendment 5 of the Constitution, in that the court deprived them of their right to trial by jury, according to the Rules of the Common Law, and to a determination of just compensation under Amendment 7 with regard to their right of trial by jury, and under Amendment 14 of the United States Constitution with regard to depriving them of property without due process of law, and thus denied them equal protection of the laws in said proceedings.

8. The court erred in instructing the jury under Instruction No. 1 offered by the condemnor, in that the court instructed the jury to consult with the City, through the office of it's City Engineer, to aid them in putting their verdict in proper form, which said Instruction exposed the jurors to undue influence and deprived the condemnees herein of their constitutional rights to trial by a jury of 12 men, and further deprived them of their constitutional rights in that the court allowed and permitted the jury to consult with the condemnor in arriving at and putting their verdict in proper form, thus permitting said City to deliberate and participate in the deliberations of said jury, all contrary to the law of trial by jury, which requires that a jury deliberate in privacy and without consulting with either party, and that said instruction was arbitrary and capricious in allowing and permitting said action by the office of the City Engineer, or the assistants to said City Engineer, and deprived these condemnees of due process of law in the consideration of their damages sustained as a result of this action brought by the condemnor.

9. The court erred in instructing the jury that they should presume that special benefits should accrue to the landowners over which said permanent sewer easements would be made, when there is no evidence that any special benefit would accrue to any of said landowners, and particularly the owners of Tract 21 and 25, condemnees herein, and which was contrary to the evidence and the facts adduced and presented to said jury.

10. The court erred in instructing the jury under Instruction No. 2 offered by the condemnor, in that the court instructed the jury that any speical benefits which you so find, which was a verdict directing construction,

requiring the jury to find special benefits to offset any actual damages which might be found by said jury as a result of the taking herein, when there was no evidence or special benefits accruing to the landowners herein offered by either the condemnor or condemnees.

11. The court erred in instructing the jury that "If the special benefits equal or exceed the actual damages which you may find and you should report no award for the taking of said tract . . . when under it/s verdict directing instruction it first required the jury to find special benefits accruing, which was contrary to the evidence and the weight of the evidence and after so finding, gave a verdict directing instruction which allowed the jury to conjecture or speculate on the amount of special benefits and directed them to measure them against actual damages and offset same, when there was no evidence of any special benefits accruing to the condemnees herein, which allowed and permitted the jury to conjecture and speculate in regard to special benefits, all of which was prejudicial to the condemnees herein, and gave the jurors a blank instruction on speculation and conjecture, contrary to the evidence, and all of the evidence, and allowed the jury to presume that there were special benefits when there was no special benefits, all of which was prejudicially erroneous to condemnees herein and against the evidence and the weight of the evidence adduced at said trial.

12. The court erred in refusing to give condemnees of Tract No. 21's and 25 Instruction A, which is the approved instruction to be given in condemnation proceedings, as set forth under Section 9.02 of Missouri Approved Instructions, and which is the correct instruction to give when only part of condemnees' property is taken and

which is the only instruction appropriate, whether or not special benefits accrue to condemnees' remaining property, and should have been given by the court instead of condemnor's Instruction No. 2 which said instruction so offered and refused by the court was condemnees' Instruction A which is the only instruction that would have allowed the jury to arrive at a fair and impartial verdict.

13. Under Instruction No. 2, the verdict is a quotient verdict.

14. The court erred in submitting the case to the jury without any instruction advising the jury what they were required to find as a condition to finding a verdict for the condemnees herein, and submitted only instructions relative to the rights of the condemnor.

15. The verdict is the result of bias and prejudice on the part of the jury which was obviously under the control of the City of Kansas City, the condemnor herein, and was specifically instructed to advise and consult with the City in regard to their verdict.

16. Because of the misconduct of the jury in advising and consulting with the condemnor, pursuant to the instructions given by the court, and because of surprise on the part of condemnees herein because of the court's refusal to give condemnees' Instruction A, and instead giving condemnor's Instruction No. 2.

17. On December 20, 1968, by allowing to each juror the sum of $450.00 as and for his services, said sum being excessive, not authorized by law, contrary to Secs. 494.100 and 1.70, Mo. R.S. 1959, and to Charter Sec. 142, establishing such fees by law, prejudicial against the condemnees and reenforcing a bias favoring condemnor, all as more fully set forth herein.

18. On May 7, 1969, by overruling condemnees' Motion To Compel Answers of the jurors as witnesses upon taking of their depositions, thereby depriving condemnees of their only reasonable and certain source of evidence as to their misconduct, fraud, bias and prejudice and that of the condemnor city's employees; and other evidence contained in said depositions was similarly improperly excluded.

19. On November 3, 1969, by failing and refusing to make responsive Findings of Fact and Conclusions of Law as to all of the issues, both those raised in motions and by trial, as requested by condemnees on or about July 1, 1969.

20. On November 3, 1969, by its Order overruling condemnees' respective Motions of December 24, 1968, as required by said Charter, for the reasons hereinbefore set forth and for the following additional reasons:

(a) The verdict of the sum of two hundred ($200.00) dollars as to condemnee Bell and of nothing as to condemnees Webb and Brightwell was inadequate; it was the result of bias and prejudice on the part of the jury and court; it was not supported by competent and substantial evidence upon the record as required by law and by Section 11 and Section 26 of Article I and by Sec. 22 of Article V of the Missouri Constitution; and it was neither lawful nor justified under the pleadings with regard to condemnees uncontroverted Answers of November 1, 1968 and November 26, 1968.

(b) The use proposed by condemnor is a private use and not a public use within the meaning of and protection afforded to condemnees by Section 28, Article I of the Missouri Constitution; the use would not benefit but would substantially injure the con-

demnees and their remaning property; the condemnor refused and failed to perform its lawful duties with regard to sewage disposal in the source area and has entered into unlawful and unauthorized contracts and arrangements with private interests with regard thereto and that the proposed use is a mere extension thereof; and condemnor is by law estopped to deny the foregoing.

21. On November 3, 1969, by its Order incorporating its "Findings of Fact" therein, for the reasons hereinbefore set forth and for the following additional reasons:

(a) All issues raised by the pleadings except the jury's finding as to the condemnees' damages were continued by the court until after the jury's verdict and trial thereof was commenced on or about January 18, 1969 and concluded on or about July 1, 1969.

(b) Additional issues as to inadequacy of the verdict as to the lack of substantial competent evidence in the record in support thereof as to improper and unlawful procedures as set forth herein as to the selection bias, prejudice of the jury and jurors and of misconduct of jurors and of counsel, and as to errors in instructions were raised by condemnees' Charter-required (Sec. 156) four-day Motions of December 24, 1968, and that evidence permitted by the court in support thereof was heard during said trial, ending July 1, 1969.

(c) The jury empaneled did not consist of six disinterested resident freeholders but of so-called "experts", experienced, professional jurors as herein set forth; allowance of $450.00 each made to them by the court was discovered by condemnees only after their said motions of December 24, 1968, were filed, but said

issues raised were argued and tried by the court ending on or about July 1, 1969.

(d) The condemnees demand for a twelve man common law jury trial was filed October 31, 1968, one day prior to the empaneling of the special charter jury and, under like circumstances, such a trial is provided for corporations under the said Charter.

(e) The issue of public use of severance damage to the remaining land owned by the condemnees, of lack of benefits to condemnees, and of the amount of claimed damages as well as other issues had all been raised by condemnees prior to jury trial, all as shown by the pleadings in the record hereof.

(f) All of the competent and substantial evidence was that the proposed use is a private use, for private developers and their customers, and not a public use within the meaning and intent of Section 26 and 28 of Article I of the Missouri Constitution.

(g) The allowance by the court without exception by condemnor, of $450.00 each to the jurors was excessive and unreasonable for the time and effort involved, is not supported by the record, is not authorized by law and is unlawful, is an abuse of the court's discretion, and the expectation thereof resulting from their previous experience created bias in the jurors for the condemnor and prejudice against the condemnees.

(h) The court's aforesaid "Findings of Fact" is not supported by competent and substantial evidence in the record, contains legal conclusions and is not responsive to condemnees request therefore as provided by law.

22. On November 3, 1969, by incorporating its "Conclusions of Law" into its Order, for the reasons hereinbefore set forth and for the following additional reasons:

(a) The provisions of the said Charter of Kansas City, in failing to provide a twelve man common law jury trial for unincorporated individuals who make the same timely demand in the same manner as provided for corporations in like circumstances, deny these condemnees equal protection of the laws under Amendment XIV of the United States Constitution and deny them equal rights and opportunities under the law in Section 2, Article I of the Missouri Constitution.

(b) The self-granted right of the condemnor city to elect to proceed in condemnation under The Charter provisions or, alternately, under the general laws of Missouri, and the exercise of that right, electing the Charter procedure in a case involving unincorporated individual condemnees, deprives these condemnees of their cited Constitutional rights.

(c) Since the jurors were not genuinely disinterested freeholders, lawfully appointed and paid, free of any taint of bias or prejudice, with excessive previous recent service in said capacity in cases involving the same condemnor, these condemnees have been denied equal treatment and protection of the laws as aforesaid and due process of law as provided by the Amendments V and XIV of the federal Constitution and of just compensation under Section 26, Article I of the Missouri Constitution.

(d) There is not statutory, charter or other lawful provision for a jury of "experts" and any ver-

dict reached by a special Charter jury, even upon viewing the property to be condemned and the adjoining property of condemnees affected thereby, must be supported by competent and substantial evidence in the record; and the basis for the award and principles upon which the jury acted in making its finding, must be in the record, in accordance with the federal and state Constitutional provisions hereinbefore set forth.

23. On Nobember 18, 1969, in entering its Judgment and Decree Confirming Verdict and Vesting Title for all the reasons hereinbefore set forth and for the following additional reasons:

(a) The verdict for the condemnee Bell was for four hundred ($400.00) dollars.

(b) The verdicts in both cases are inadequate, unsupported by competent and substantial evidence in the record and in conflict with the pleadings.

WHEREFORE, the condemnees prays that the court set aside its said judgment, amend same to award the condemnee Bell the sum of nine Thousand Nine Hundred Thirty Four Dollars and eight cents ($9,934.08) and award condemnees Webb and Brightwell the sum of Nine thousand four hundred twenty six Dollars and 25 cents ($9,426.25 and their respective costs and expenses, or alternatively, that amend its judgment to dismiss con-

demnors cause, or alternatively, that it grant condemnees a new trial herein.

/s/ Jack C. Terry
Jack C. Terry
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Independence, Missouri 64053
CL 4-6070
Attorney for Condemnees
Brightwell and Webb

/s/ W. K. Poindexter
William K. Poindexter
801 Broadway
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Attorney for Condemnee Bell

Copy of the foregoing mailed this 28th day of November, 1969 to: Ned B. Bahr, Associate City Counselor, 2800 City Hall, Kansas City, Missouri, Attorney for Condemnor.

/s/ Jack C. Terry
/s/ W. K. Poindexter
Attorneys for Condemnees Brightwell and Webb and Bell

CERTIORARI DENIED